APPEAL NO. 34265

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WELLS FARGO BANK, N.A.,
Assignee and Successor in Interest
to FLEET NATIONAL BANK,
a national banking association,

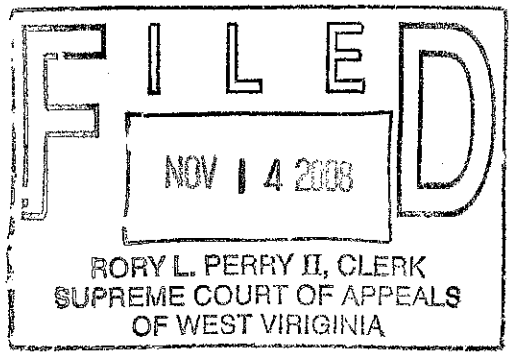
Appellant-Plaintiff,

v.

UP VENTURES II, LLC; IRONWOOD ACCEPTANCE COMPANY, a Delaware corporation; PALO VERDE TRADING COMPANY, LLC, an Arizona limited liability company; JEFFREY E. HALL and ANNETTE L. HALL,

Appellees-Defendants.

Upon Appeal from the
Cabell County Circuit Court
Civil Action No.: 07-C-26
The Honorable David M. Pancake



APPELLANT'S REPLY BRIEF

Stephen L. Thompson, Esquire
W.Va. State Bar No. 3751
Barth & Thompson
Post Office Box 129
Charleston, WV 25321
Telephone: (304) 342-7111
Facsimile: (304) 342-6215

Dated: November 14, 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

COMES NOW the Appellant, and in reply to the points and authorities cited and relied upon by the Appellees in their Brief, the Appellant states as follows:

I. THE FACT THAT THE APPELLEES STRICTLY COMPLIED WITH THE PERTINENT STATUTORY REQUIREMENTS IS NOT DISPOSITIVE.

As a preliminary matter, the Appellees assert that they strictly complied with the pertinent statutory requirements of the West Virginia Code. (*See* Appellees' Brief at 6-7.) Such a statement begs the question, however, as the Appellant asserts that the express terms of the statute do not answer the specific question presented here: Was the Appellant and its predecessor, as lienholders of record during the gap period, entitled to notice of the right to redeem? (*See generally* Appellant's Brief at 8-16; *see, e.g., id.* at 9 (noting that W.Va. Code, § 11A-3-19(a) "is silent as to defining the class of persons 'to be served with notice to redeem'").)

Appellant's initial Brief, and this Reply Brief, make it clear that the answer to this inquiry is in the affirmative, and demonstrates why the Appellant is entitled to prevail upon this appeal. Moreover, as even the Appellees concede in their Brief , the Appellant's arguments on appeal are "compelling." Appellees' Brief at 16.

II. THE STATUTORY 18-MONTH GAP PERIOD.

Furthermore, the Appellees refute even the existence of the 18-month gap period. (*See* Appellees' Brief at 7-8.) However, the Appellees do not make any argument to explain their conclusory assertion, and, thus, that argument should not be considered by this Court. *See, e.g., Farmer v. Knight*, 207 W.Va. 716, 722, 536 S.E.2d 140, 146 (2000) (the "casual mention of an issue in a brief" and its "cursory treatment" therein is "insufficient to preserve the issue on

appeal"). To the extent that the text immediately following the Appellees' assertion is construed to be argument in support thereof (*see* Appellees' Brief at 7-8), that argument misses the point.

The mere fact "that the Legislature thoroughly considered adequate notice and Due Process requirements in its construction and enactment of" the tax sale statutes (*see id.* at 8), does not necessarily mean that the statute does in fact comply with the Due Process Clause, either on its face or as applied. *See State ex rel. Haden v. Calco Awning & Window*, 153 W.Va. 524, 531, 170 S.E.2d 362, 366 (1969) ("Each case, where the constitutionality of a statute is questioned, must be determined on its own particular facts."); *Sale ex rel. Sale v. Goldman*, 208 W.Va. 186, 217-18, 539 S.E.2d 446, 477-78 (2000) (Starcher, J., dissenting) (a statute does not pass constitutional muster under the First Amendment simply because the statute contains a First Amendment exception).

Although the Appellees suggest that the Appellant's predecessor, Fleet National Bank, was not within the class of persons entitled to notice under the pertinent statutory requirements (*see* Appellees' Brief at 8-9), the authorities cited in their own brief negate their argument.

> The persons entitled to notice to redeem in conjunction with a purchaser's application for a tax deed, pursuant to W.Va. Code § 11A-3-19(a)(1) . . . are those persons who are permitted to redeem the real property subject to a tax lien or liens, as contemplated by W.Va. Code § 11A-3-23(a) . . . , which persons include "the owner" of such property and "any other person who was entitled to pay the taxes" thereon.

Syl. Pt. 4, *Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999), *quoted in* Appellees' Brief at 8-9.

Moreover, the *Rollyson* court expressly held that lienholders such as Fleet and the Appellant, pursuant to a deed of trust, were entitled to notice of the right to redeem the realty which served as the security for the loan to the defaulting property owner. *See id.* at 375-76, 518 S.E.2d at 379-80 ("[W]hen property subject to a deed of trust is sold for the recoupment of

delinquent taxes, the property continues to retain its posture as security for the deed of trust note" and, thus, when the subject property was purchased at the sheriff's sale, the purchaser stepped into the shoes of the mortgagor and the property "continue[d] to be encumbered by the deed of trust and to provide security for the deed of trust note").

The interest of the Appellant is identical to that of the lender in *Rollyson*. In *Rollyson* this Court focused upon the provisions of the deed of trust which secured the lenders, by the terms of which the secured parties were authorized to pay any delinquent taxes which had accrued upon the property, as well as any tax liens upon the property. *See id.* at 375, 518 S.E.2d at 379.

The deed of trust securing Appellant affords these same rights. The Deed of Trust from the Halls, attached to the Appellant's Complaint as Exhibit B, requires that the borrowers "shall pay all taxes, assessments, charges, fines, and other impositions attributable to the Property which can attain priority over this Security Instrument . . .." Deed of Trust, ¶ 4.

The Deed of Trust further provides that, if the borrowers fail to perform their obligations, then the lender "may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property . . .. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument . . .." *Id.*, ¶ 9.

Thus, it is clear that the Appellant is within the class of persons entitled to notice to redeem in conjunction with the tax sale purchaser's application for a deed.

III. EXISTING WEST VIRGINIA CASE LAW DOES NOT RESOLVE THE INSTANT DISPUTE.

In their brief, the Appellees argue that the notice provisions of West Virginia Code, § 11A-3-19(a), do not require any update of the list of parties entitled to notice to redeem after the cutoff date of December 31 of the year following the tax sale. (*See* Appellees' Brief at 9-10.)

Although the Appellees cite *Lilly v. Duke*, 180 W.Va. 228, 376 S.E.2d 122 (1988), and *Mingo County Redev. Auth. v. Green*, 207 W.Va. 486, 534 S.E.2d 40 (2000), in support of their argument, their reliance on those cases is misplaced.

The precise question presented by this appeal is whether the Appellant is entitled to notice when it recorded its interest in the subject realty during the statutory gap period. (*See* Appellant's Brief at 5; *see also* Appellees' Brief at 7.) Contrary to the Appellees' contention (*see* Appellees' Brief at 9), the *Lilly* decision did not address or answer that particular question (*see* Appellant's Brief at 17-20), and in *Green*, this Court expressly noted that it did "not address the Code sections that set forth the duties of a purchaser at a 'sheriff's-sale' as the Sheriff was unable to sell the property in [that] case," 207 W.Va. at 493 n.22, 534 S.E.2d at 47 n.22. Unlike *Green*, however, the instant case does involve the duties of a purchaser at a sheriff's sale. (*See* Appellant's Brief at 3 (Ironwood Acceptance Company purchased the subject property from the Sheriff of Cabell County, and Ironwood then prepared a list of parties entitled to notice of the right to redeem); Appellees' Brief at 2.)

Alternatively, even on the merits, the *Green* decision is not controlling here. Although the Appellees are correct that the court in *Green* refused to create a new class of persons entitled to notice (*see* Appellees' Brief at 10), the new class of persons referred to therein were persons who purportedly asserted their interest by telephone and/or written letters. *See Green*, 207 W.Va. at 495, 534 S.E.2d at 49. In the instant case, by contrast, the Appellant clearly falls within an already existing class of persons entitled to notice: mortgagees of record. *See Rollyson*, 205 W.Va. at 374-76, 518 S.E.2d at 378-80. The only question here is whether the Appellant's interest was made of record in time to have been notified of the right to redeem.

Consequently, neither *Lilly* nor *Green* is dispositive of the issues presented in this appeal.

IV. THE APPELLEES' ATTEMPTS TO DISTINGUISH ANALOGOUS FEDERAL CASE LAW MUST FAIL.

In their brief, the Appellees seek to distinguish *Jones v. Flowers*, 547 U.S. 220 (2006), from the instant case in two respects. (*See* Appellees' Brief at 11.) First, the Appellees note that, whereas *Jones* dealt with the interest of a property owner, the instant case deals with a lienholder. (*See id.*) Yet that is simply a distinction without a difference; as the Appellees readily admit, lienholders have a statutory right to redemption, and thus notice thereof, under the West Virginia law. (*See id.* ("The Appellees herein recognize that lienholders of record have a statutory right to redemption under the West Virginia Code.").) *See Rollyson*, 205 W.Va. at 374-76, 518 S.E.2d at 378-80.

Second, the Appellees suggest that the holding in *Jones* was limited to its facts, i.e., when mailed notice of an impeding tax sale is returned unclaimed, due process requires the party mailing such notice to take further action as is reasonably practicable. (*See* Appellees' Brief at 11 (citing Syl. Pt. 1, *Jones*).) Yet there is no indication that the ruling in *Jones* is, or even should be, limited to its facts. Rather, the generic legal principle taken from *Jones*, that reasonable efforts must be taken to provide the requisite notice to redeem in the tax sale context, is applicable to the instant case.[1]

The Appellees also seek to distinguish *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005), from the instant case. (*See* Appellees' Brief at 12.) Although the Appellees are correct that *Plemons* (as well as *Jones*, for that matter) does not "mandate[ ] any specific statutory scheme"

---

[1]Additionally, the Appellees seek to distinguish *Jones* by once again asserting that the Appellant is not an intended recipient for notice purposes under the West Virginia statutory scheme. (*See* Appellees' Brief at 11-12.) As noted previously, however, such is simply incorrect. (*See* discussion in text, *supra*, pp. 2-3 (citing *Rollyson*, 205 W.Va. at 374-76, 518 S.E.2d at 378-80).)

in this context but, rather, merely requires reasonable efforts to provide adequate notice, that alone does not render *Plemons* (or *Jones*, for that matter) irrelevant "to the issue before this Court." (*See* Appellees' Brief at 12.) As previously noted, the crucial issue in this appeal is whether a gap lender (i.e., the Appellant) is entitled to notice of the right to redeem. It is the Appellant's position that the reasonable efforts mandated in *Jones* and *Plemons* include a second look at the land records at some time closer to the end of the 18-month statutory gap period. (*See generally* Appellant's Brief at 8-16.)

Accordingly, while perhaps not dispositive, both *Jones* and *Plemons* are certainly relevant to, and informative of, the issue presented herein.

V. THE APPELLEES' POLICY ARGUMENTS ARE FLAWED.

In their brief, the Appellees seek to counter the Appellant by offering several policy rationales.

First, the Appellees argue that the gap lender is adequately protected by means of a proper title examination at the time the lien is impressed on the property. (*See* Appellee' Brief at 12-13.) However, whether a title examination was performed, negligently or not, misses the point. Here, the Appellant's posit that the Due Process Clause and the relevant West Virginia statutes required that Appellant be given notice of the right to redeem but that such did not happen. The Appellant's constitutional and statutory rights prevail over the asserted common-law protection noted by the Appellees. *See Harbert v. Harrison County Ct.*, 129 W.Va. 54, 61-62, 39 S.E.2d 177, 184 (1946) (the West Virginia Constitution "is the supreme law of West Virginia . . . subject only to the Constitution . . . and . . . laws of the United States"; "It is the solemn duty of this Court, its creature, to obey and give full force and effect to all its terms and provisions."); *Simms v. Sawyers*, 85 W.Va. 245, 101 S.E. 467 (1919) (the provisions of the Constitution stand upon a

higher plane than statutes); *Thibodeau v. Design Group One Architects*, 802 A.2d 731, 746 (Conn. 2002) (the common law cannot abrogate statutory law; validly expressed legislative intent must always control over contrary notions of the unwritten law (quoting *Brown v. Ford*, 905 P.2d 223, 228-29 (Okla. 1995))).

Second, whereas the Appellant argues for a reexamination of the records closer to the actual recordation of the tax sale deed, the Appellees suggest that such a rule would not eviscerate the "gap period" and, thus, additional "gap lenders" could make the same argument to the Court *ad infinitum* such that "there [would] be no reasonable finality to any tax sale." (Appellees' Brief at 14.) To the contrary, the statute itself provides the desired finality as any and all claimed interests in the subject property must be made or asserted by "the thirty-first day of December of . . . the year following the sheriff's sale." W.Va. Code, § 11A-3-19(a).

All that the Appellant seeks here is an examination of the pertinent land records at a *reasonable* time in relation to the expiration of the right to redeem. Exactly what would be reasonable under the circumstances must be determined on a case-by-case basis,[2] but it would certainly be **unreasonable**, as was the case here, to check the land records a single time at the very beginning of the statutory 18-month gap period.

Third, the Appellees further question "who would become the owner of the property and under what terms and conditions" if the Appellant is granted the relief requested? (*See* Appellees' Brief at 14.) The answer is simple: "Whenever the deed in such case is set aside, the decree shall be that all the right, title and interest of the former owner, his heirs or assigns, is revested in him or them." W.Va. Code, § 11A-4-5. Although Jeffrey and Annette Hall would

---

[2]*Cf. Garcia v. Meza*,235 F.3d 287,291 (7th Cir. 2000) (in an analogous context, the Seventh Circuit declined to adopt a *per se* rule that examines notice only at the time it is sent, instead requiring a case-by-case, fact-specific, analysis that considers all of the circumstances).

once again have title to the property, the property would still be subject to the various liens against it. *See Rollyson.* at 376, 518 S.E.2d at 380. Thus, the tax sale process could begin anew with the statutorily required notice of right to redeem being sent to all appropriate persons.

Consequently, all three of the Appellees' policy rationales are flawed and should not be included in any final determination of the instant appeal.

VI. THE APPELLEES' ATTEMPT TO DISTINGUISH EXCEEDINGLY ANALOGOUS OUT-OF-STATE AUTHORITY FAILS.

Finally, the Appellees seek to distinguish the Rhode Island decision in *Kildeer Realty v. Brewster Realty*, 826 A.2d 961 (R.I. 2003). (*See* Appellees' Brief at 15-16.) Notably, however, the Appellees do not attack that portion of *Kildeer* relied upon by the Appellant: A statute requiring that "all mortgagees of record" be given notice of an impending tax sale "extend[s] to all recorded interest holders, no matter how recently their interests were recorded." (Appellant's Brief at 16 (quoting *Kildeer*, 826 A.2d at 965).)

While the Appellees are correct that the Rhode Island court ultimately rejected the property owner's claim, the rejection was due to the property owner's failure to timely bring such a claim. (*See id.* (citing *Kildeer*, 826 A.2d at 966 (citing R.I. Gen. Laws § 44-9-31)).) To the extent that the Appellees seek to rely on *Kildeer* for the proposition that the Appellant's claim is time-barred by West Virginia Code, § 11A-4-4 (*see* Appellees' Brief at 15-16), the Appellant's analysis as is contained in Part III of its opening brief (*see* Appellant's Brief at 17-23) continues to be valid.

The principle of this authority is unaffected by the Rhode Island Court's ultimate disposition of the appeal, and should be considered by this Court in its resolution of this appeal.

VII. APPELLEES' DISCUSSION OF ANY PROCEDURAL OBJECTION IS BOTH WAIVED AND IS INAPPLICABLE TO BAR THE APPELLANT'S CLAIMS.

Appellees assert that the Appellants failed to comply with West Virginia Code, § 11A-4-5 as the underlying civil action was not commenced in the name of the Halls. (*see* Appellee's Brief at 13-14, 16).

Contrary to interpretation placed upon the statute by the Appellees, the statute requires that the action be brought "on behalf of" the former owners, not in their name. This action was not commenced to deprive the Halls of their rights to the property but, instead, to protect the interests of both the former owners and their lender. As was pointed out in Appellant's Brief, the Halls continued to make payments to Fleet, and Fleet continued to pay the taxes on the property to the Sheriff. (*see*, Appellant's Brief at 4, 13). This action was clearly brought pursuant to the provisions of the statute and not in derogation thereof.

As Appellant notes above, should it prevail upon this Appeal, the Halls will be restored to their ownership of the property, with the Appellant's security interest still attached, so that their interests are fully protected in this action. *See, discussion,* at 7-8, *supra.*

The procedural issue which the Appellees observe to the Court in their Brief were not raised by them below, and thus any bar to recovery they perceive exists is deemed to have been waived. Had Appellees raised the issue below, certainly the trial court would have allowed the Appellant to amend its Complaint so as to allow it to conform to the provisions of West Virginia Code, § 11A-4-5, if the trial judge deemed the Complaint deficient for any reason on that ground.

Moreover, the procedural issue is not properly raised by the Appellees in their Brief. Their Brief merely alludes to the perceived deficiency, and this Court has held that such treatment is insufficient to present any issue for decision. "[C]asual mention of an issue in a

brief is cursory treatment insufficient to preserve the issue on appeal." *State v. Lilly* 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995); *accord, Johnson v. Garlow*, 197 W.Va. 674, 682 n. 7, 478 S.E.2d 347, 355 n. 7 (1996).

Appellees' assertions are flawed, and, because they were never raised below are waived and are not properly presented for decision by this Court, do not impair Appellant's right to prevail in this appeal.

RELIEF PRAYED FOR

In light of the foregoing arguments and authorities cited, it is clear that the statutory provision prohibiting action to set aside a tax sale deed with a jurisdictional defect after the expiration of the three-year period set forth in West Virginia Code, § 11A-4-4(a) is unconstitutional and violative of due process. In the instant case, the Appellant was entitled to a notice to redeem pursuant to West Virginia Code, § 11A-3-19(a), and, since Appellant was not provided the required notice to redeem, it is the Appellant's right to have the tax deed issued to the purchaser set aside.

WHEREFORE, the Appellant prays that the ruling of the Cabell County Circuit Court be reversed and remanded for further proceedings consistent with the legal conclusions stated herein.

Respectfully submitted,

WELLS FARGO BANK, N.A.

Stephen L. Thompson, Esq. (W.Va. State Bar No. 3751)
BARTH & THOMPSON
Post Office Box 129
Charleston, WV 25321
Telephone: (304) 342-7111
Facsimile: (304) 342-6215
Attorney for the Appellant

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WELLS FARGO BANK, N.A.,
Assignee and Successor in Interest to
FLEET NATIONAL BANK,
a national banking association,

Appellant-Plaintiff,

v.

UP VENTURES II, LLC; IRONWOOD ACCEPTANCE COMPANY, a Delaware corporation; PALO VERDE TRADING COMPANY, LLC, an Arizona limited liability company; JEFFREY E. HALL and ANNETTE L. HALL,

Appellees-Defendants.

APPEAL NO. 34265
Upon appeal from the
Cabell County Circuit Court
Civil Action No.: 07-C-26
The Honorable David M. Pancake

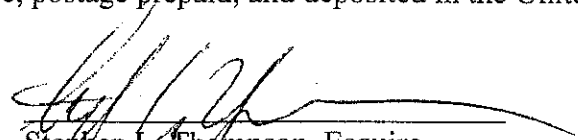
CERTIFICATE OF SERVICE

I, Stephen L. Thompson, counsel for Wells Fargo Bank N.A., Assignee and successor in interest to Fleet National Bank N.A., the Appellant herein, certify that service of the Appellant's Reply Brief was made upon the parties listed below by mailing a true and exact copy thereof to

Ronald J. Flora, Esquire
1115 Smith Street
Milton, WV 25541

Jeffrey E. and Annette L. Hall
6370 Little Seven Mile Road
Huntington, WV 25702

in properly stamped and addressed envelope, postage prepaid, and deposited in the United States mail this 14th day of November 2008.



Stephen L. Thompson, Esquire
W.Va. State Bar No. 3751